Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

(12) (6)
No. 04-1704 & No. 04-1724

In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

WILLIAM W. WILKINS, ET AL.,

Petitioners,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

Brief Of *Amici Curiae* Louisville Area Chamber of Commerce, Inc., Greater Cincinnati Chamber of Commerce, Nashville Area Chamber of Commerce, Commerce Lexington, Inc., Scott County United, Inc., Northern Kentucky Chamber of Commerce & Tri-County Economic Development Corp., Knoxville Area Chamber Partnership, Chattanooga Area Chamber of Commerce, Memphis Regional Chamber of Commerce, Johnson City/ Jonesborough/Washington County Chamber Of Commerce & Economic Development Board, & Kingsport Area Chamber of Commerce In Support Of Ohio Petitioners' and DaimlerChrysler Corp.'s Petitions For Writ Of *Certiorari*

Jeffrey R. Teeters (*counsel of record*)
Robert D. Shank
FROST BROWN TODD LLC
201 E. 5th St., 2200 PNC Center
Cincinnati, Ohio 45202
(513) 651-6800

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* IN THIS CASE 1

STATEMENT OF THE CASE 5

SUMMARY OF ARGUMENT 6

ARGUMENT 7

1. The purpose of Ohio's tax credit is to encourage domestic industry 8

2. The Sixth Circuit Court of Appeals decided an important Commerce Clause question in a way that conflicts with the Michigan Supreme Court and significantly departs from this Court's long-standing precedent 14

3. The tax incentives at issue do not interfere with free trade among the States 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES **PAGE(S)**

American Trucking Ass'n, Inc. v. Scheiner, 482 U.S. 266 (1987) 7

Armco, Inc. v. Hardesty, 467 U.S. 638 (1984)..... 6, 7, 10, 16

Bacchus Imps. v. Dias, 468 U.S. 263 (1984) 5, 6, 10

Boston Stock Exch. v. Tax Comm'n, 429 U.S. 318 (1977) 5, 6, 8, 10

Caterpillar, Inc. v. Dept. of Treasury, 440 Mich. 400, 488 N.W.2d 182 (1992) 5, 6, 7, 8, 10, 15

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 14

Container Corp. v. Franchise Tax Bd., 463 U.S. 159 (1983) 15

Cuno v. Daimler Chrysler, Inc., 386 F.3d 738 (6th Cir. 2004) 11, 15

Department of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1978) 16

Hughes v Alexandria Scrap Corp., 426 U.S. 794 (1976) 11

Kelo v. City of New London, 125 S.Ct. 2655, 2005 U.S. LEXIS 5011(2005) 8

New Energy Co. v. Limbach, 486 U.S. 269 (1988)..... 11

Nordlinger v. Hahn, 505 U.S. 1 (1992) 8

Trinova Corp. v. Michigan Dept. of Treasury,
498 U.S. 358 (1991) 6, 8, 14

Westinghouse Elec. Corp. v. Tully,
466 U.S. 388 (1984) 6

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) 10, 11

STATUTES AND RULES

Federal Rules of Civil Procedure, Rule 12(b)..... 13

Ohio Revised Code § 5733.33 17

OTHER AUTHORITIES

Andrea Lee Rimer, "Environmental Liability and the Brownfields Phenomenon: An Analysis of Federal Options for Redevelopment," 10 TUL. ENVTL. L.J. 63, 106 (1996) 9

Brian Thomas Lang, "Note: Ohio's Voluntary Action Program: Solving Ohio's Toxic Waste Woes?" 60 OHIO ST. L.J. 285, 286 (1999) 9

Deming, QUALITY, PRODUCTIVITY, AND COMPETITIVE POSITION (1982)..... 11

Economic Development Today: A Report to the Profession (American Economic Development Council, 1984).... 11

Elizabeth Weissman & Catherine G. Ware, "A Holistic Approach to Business Relocation and Expansions," J. MULTISTATE TAX'N & INCENTIVES, 1999 WL 1711518 at *31 (Aug. 1999) 11

Kathleen A. Norat & Eileen M. Lomorielo, "Clawbacks: A Help or A Hindrance in Negotiating Incentive Benefits?" J. MULTISTATE TAX'N & INCENTIVES, 2004 WL 335216 at *27 (Feb. 2004) 11

Peter D. Enrich, "Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business," 110 HARV. L. REV. 377 (Dec. 1996) 16

Regional Multipliers, U.S. Dept. of Commerce, March 1997 (3rd ed.) 11, 12

Scott Sherman, "Government Tax and Financial Incentives in Brownfields Redevelopment: Inside the Developer's Pro Forma," 11 N.Y.U. ENVTL. L.J. 317, 318 (2003) 9, 13

Brief of *Amici Curiae* Louisville Area Chamber Of Commerce, Inc., Greater Cincinnati Chamber of Commerce, Nashville Area Chamber of Commerce, Commerce Lexington, Inc., Scott County United, Inc., Northern Kentucky Chamber of Commerce & Tri-County Economic Development Corporation, Knoxville Area Chamber Partnership, Chattanooga Area Chamber of Commerce, Memphis Regional Chamber of Commerce, Johnson City/Jonesborough/Washington County Chamber of Commerce and Economic Development Board, and Kingsport Area Chamber of Commerce In Support of Ohio Petitioners' and DaimlerChrysler Corporation's Petitions for Writ of Certiorari

INTEREST OF *AMICI CURIAE* IN THIS CASE[1]

Identification of the *Amici Curiae*

Louisville Area Chamber of Commerce, Inc. (d/b/a Greater Louisville Inc.), Greater Cincinnati Chamber of Commerce (d/b/a Cincinnati USA Regional Chamber), Nashville Area Chamber of Commerce, Commerce Lexington, Inc., Scott County United, Inc., Northern Kentucky Chamber of Commerce and Tri-County Economic Development Corporation, Knoxville Area Chamber Partnership, Chattanooga Area Chamber of Commerce, Memphis Regional Chamber of Commerce, Johnson

[1] Pursuant to Supreme Court Rule 37.6, the *Amici Curiae* Urban Chambers state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than the *Amici Curiae*, their members, and their counsel, make a monetary contribution to the preparation or submission of this brief. Counsel of record for all Petitioners and Respondents have consented to the filing of this brief.

City/Jonesborough/Washington County Chamber of Commerce and Economic Development Board, and Kingsport Area Chamber of Commerce (collectively, the "Urban Chambers") represent thousands of businesses in their metropolitan areas. The Urban Chambers and their members are engaged in business in Ohio, Kentucky, and Tennessee, and thus have a particular interest in the ultimate resolution of the constitutionality of Ohio's investment tax credit. Ohio's investment tax credit in no way violates the Commerce Clause, and, accordingly, the Sixth Circuit's decision should be reversed.

Greater Louisville Inc. is the metro chamber of commerce and economic development agency representing approximately 2,400 businesses and organizations in the Louisville, Kentucky – southern Indiana metropolitan area.

Cincinnati USA Regional Chamber is the nation's fifth largest chamber, representing the interests of more than 6,000 member businesses with approximately 380,000 employees in 15 counties in southwestern Ohio, northern Kentucky, and southeastern Indiana.

The Nashville Area Chamber of Commerce represents approximately 3,300 member businesses and 249,000 employees in a 10-county region in middle Tennessee.

Commerce Lexington, Inc. promotes economic development, job creation, and overall growth in Lexington, Kentucky and its neighboring communities. It includes over 1,800 member companies and over 3,700 business professionals.

Scott County United Inc. has 527 active members in Georgetown, Kentucky and surrounding areas, promoting and coordinating local economic development.

The Northern Kentucky Chamber of Commerce seeks to expand and develop business for a steadily rising tri-state region with a workforce of over 1 million in northern Kentucky and Cincinnati. It represents 1,900 business members consisting of regional, national, and international companies. Tri-County Economic Development Corporation is the primary economic development marketing agency and the primary entity for the retention and expansion of existing industries in Boone, Kenton, and Campbell Counties in northern Kentucky.

The Knoxville Area Chamber Partnership is a private, nonprofit, membership-driven organization focusing on economic development. Comprised of more than 1,700 member businesses, its primary focus is to drive regional economic prosperity. As the leading economic development agency for both the City of Knoxville and Knox County, Tennessee, the chamber focuses on generating business opportunities and creating an environment for networking and sustained prosperity.

The Chattanooga Area Chamber of Commerce brings Chattanooga, Tennessee-area businesses together in support of economic growth and initiatives that support the community. The Chattanooga Area Chamber of Commerce has more than 1,700 members, ranging from single employee operations to companies with more than 2,000 employees. It provides a range of services that support the expansion of existing industry, entrepreneurial activity, and business recruitment.

The Memphis Regional Chamber of Commerce is the leading economic development organization for the three-state, eight-county Memphis metropolitan area. The nearly 2,400 companies that comprise its membership range from large international companies having over 30,000 local employees to one-person businesses.

The Johnson City/Jonesborough/Washington County Chamber of Commerce and Economic Development Board provide services to the business community in the State of Tennessee's fourth largest metropolitan area. With nearly 900 members, its purpose is to promote economic and community development. The Board serves as an industrial/business recruiter, with a principal mission of promoting economic development.

The Kingsport Area Chamber of Commerce is a private, non-profit business organization comprised of nearly 1,000 business members in northeast Tennessee. Its goal is to utilize its resources to focus efforts on enhancing a strong and viable business environment for the Kingsport, Tennessee area.

The *Amici Curiae*'s Interest

If the lower court's ruling is permitted to stand, Ohio, Kentucky, Tennessee, Michigan, and these *Amici* could be outsiders deprived of the chance to compete freely in economic development activities with the other 46 States, as well as internationally.

The Urban Chambers are on the front lines of economic development activities for a global economy that starts, lives, and dies on the local level. Accordingly, the Urban Chambers have a keen interest in the outcome of this case because they are constantly involved in economic development, job creation, and brownfield revitalization in their respective states, regions, and metropolitan areas. They can explain the profound adverse effects on local communities that the Sixth Circuit's incorrect interpretation of the Commerce Clause will have, absent a grant of *certiorari* and reversal.

The Sixth Circuit's opinion undermines the Urban Chambers' ability to engage in the economic competition that is the underlying goal of the Commerce Clause. *See Bacchus Imps. v. Dias*, 468 U.S. 263, 272 (1984) ("[C]ompetition among the States for a share of interstate commerce is a central element of our free-trade policy."). Until this Sixth Circuit opinion, all states were "free to 'structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry.'" *Caterpillar, Inc. v. Dept. of Treasury*, 440 Mich. 400, 424, 488 N.W.2d 182, 192 (1992) (quoting *Boston Stock Exch. v. Tax Comm'n*, 429 U.S. 318, 336-37 (1977)). Even the Respondents agree that it is "vital for this Court to step in to resolve the conflict among the circuits, so that businesses will be able to make well-informed decisions about where to locate new facilities, and so that state and local governments will be able to design and offer incentive packages that comport with constitutional requirements." *See* Cuno, *et al.*'s Petition for Writ of Certiorari, Case No. 04-1407, at 19.

STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals overturned Ohio's statutory investment tax credit program, which was designed to encourage all manufacturers, both in and outside of Ohio, to make capital and other job creating investments in Ohio. In exchange for any manufacturer making a qualifying investment in Ohio, the program provided a credit against the manufacturer's Ohio franchise tax liability, which otherwise would necessarily increase due to the new capital investment. The program applies equally to all manufacturers regardless of their state of incorporation, principal place of business, or location of other facilities or operations. Moreover, the investment tax credit program placed no burden upon manufacturers that chose to invest their resources in other locations outside of Ohio. Nevertheless, the Sixth Circuit accepted the plaintiffs-

respondents' admittedly novel theory to find this tax program in violation of the Commerce Clause.

SUMMARY OF ARGUMENT

This case presents a significant issue for cities, businesses, and workers nationwide, because the Sixth Circuit's ruling creates a conflict between that court, the Michigan Supreme Court, and this Court's precedent. That conflict strikes at the heart of States' abilities to employ common tax incentive programs as means of encouraging economic development and job creation. As it stands now, the Sixth Circuit's ruling creates, rather than remedies, an undue burden on interstate commerce.

First, states are constitutionally permitted to enact laws that have the "effect of encouraging domestic industry." *Bacchus*, 468 U.S. at 271-72. Certainly, "a discriminatory effect does not result from fair encouragement of in-state business...." *Caterpillar*, 488 N.W. 2d at 193 (citing *Armco, Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984); *Boston Stock Exchange*, 429 U.S. at 336-37). As supported by a wide range of data regarding new investments and thousands of newly created jobs, the Ohio investment tax credit has neither an impermissible purpose nor an impermissible effect.

Second, the Sixth Circuit's decision is a departure from prior Supreme Court jurisprudence interpreting the dormant Commerce Clause. *See Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 385-86 (1991); *Bacchus*, 468 U.S. at 272; *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 407 n. 12 (1984). This Court has consistently ruled that States may structure their tax codes and provide economic development incentives as mechanisms for competition amongst themselves. The Sixth Circuit's ruling abandoned that precedent, and wholly failed to identify any grounds for

the adoption of plaintiffs-respondents' novel application of the Commerce Clause. In addition, the Sixth Circuit's ruling creates a direct conflict with the Michigan Supreme Court's decision in *Caterpillar*. In *Caterpillar*, the Michigan Supreme Court addressed a similar dormant Commerce Clause attack on a state investment tax credit, and found that tax credit to comply with this Court's rulings and guidance. Therefore, inconsistent rulings place States within the Sixth Circuit on an uncertain foundation and at a disadvantage relative to the remaining 46 States that remain free to employ such long-accepted economic development tools.

Third, this Court has previously stated that a state tax program must have internal consistency, *i.e.*, it "must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *American Trucking Ass'n, Inc. v. Scheiner*, 482 U.S. 266, 284 (1987) (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)). In the context of this case, virtually every State employs tax incentives for promoting economic development. Regardless of arguments as to the efficacy of those incentive programs, there is absolutely no evidence that they are interfering with free trade. Ironically, interference with free trade will arise only if the Sixth Circuit's opinion stands, thereby prohibiting Ohio, and possibly Kentucky, Tennessee, and Michigan, from utilizing the competitive tools that remaining States have used for decades and continue to use.

ARGUMENT

Review of this matter is essential. That review could easily (1) enforce the notions of federalism recognized by this Court that permit States to encourage domestic commerce; (2) resolve conflicting rulings that now exist within the Sixth Circuit; and (3) prevent the Sixth Circuit's ruling from significantly interfering with interstate commerce and free trade.

1. The purpose of Ohio's tax credit is to encourage domestic industry.

Ohio's investment tax credit does not have a discriminatory purpose. The Ohio investment tax credit is open and available to any manufacturer that chooses to do business in Ohio. It applies equally to all manufacturers regardless of where else they may choose to do business. Moreover, the "design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing state" is a "laudatory goal" recognized by this Court. *Trinova,* 498 U.S. at 385-86 (quoting *Boston Stock Exch. v. Tax Comm'n*, 429 U.S. 318, 336 (1977)). This Court recently reiterated that constitutional deference by confirming that "[o]ur earliest cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs." *Kelo v. City of New London,* 125 S.Ct. 2655, 2005 U.S. LEXIS 5011, at *24 (2005). In the Commerce Clause context that translates into States being free to "structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.,* 429 U.S. at 336-37; *Caterpillar,* 488 N.W. 2d at 192; *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) ("[T]he State has a legitimate interest in local neighborhood preservation, continuity, and stability.").

a. State tax incentives encourage domestic industry by promoting brownfield revitalization

Federal and state policy (both of which are implemented on the local level) have long encouraged and incentivized businesses to invest in existing facilities as a way to stem development onto undeveloped land. As urban chambers of commerce, these *Amici Curiae* are on the front lines of promoting and administering these important

policies, yet without state legislation they are virtually powerless to effectively address the problem. One commentator summarized this "brownfields redevelopment" issue as follows:

> [B]rownfield sites continue to litter America's urban landscape, leading federal, state and local policymakers to turn to more broad-based environmentally impaired properties. Familiar to economic development officials and those who finance projects in designated revitalization and empowerment zones, newly adopted brownfield incentives take the form of property tax abatements, low-interest loans, grants, and expensing of project costs for income tax purposes. . . . [This] movement toward government tax and financial incentives reflects a recognition of the larger community interest in successful brownfields redevelopment....[2]

If those goals are not pursued on a local level, they may not get implemented at all. "[S]tates may be more willing than the federal government to supply necessary funds or offer incentives in order to facilitate cleanup. States are especially motivated because empty brownfields do not contribute to the tax base of the states' communities."[3]

---

[2] Scott Sherman, "Government Tax and Financial Incentives in Brownfields Redevelopment: Inside the Developer's Pro Forma," 11 N.Y.U. ENVTL. L.J. 317, 318 (2003).

[3] Brian Thomas Lang, "Note: Ohio's Voluntary Action Program: Solving Ohio's Toxic Waste Woes?" 60 OHIO ST L.J. 285, 286 (1999) (citing Andrea Lee Rimer, "Environmental Liability and the Brownfields Phenomenon: An Analysis of Federal Options for Redevelopment," 10 TUL. ENVTL. L.J. 63, 106 (1996) ("Mayors of thirty- three cities

These laudable policies encourage businesses to keep jobs close to the people who need them most, to attract capital investment, and to modernize existing manufacturing buildings. *Caterpillar*, 488 N.W.2d at 192 (citing *Boston Stock Exch.*, 429 U.S. at 336-37). These policies support state and local tax incentive programs and are of exceptional public importance to every citizen, community, and local government. Therefore, state and local tax incentives are a common and useful tool, because they directly address and promote each of these policy considerations. Rather than consider those purposes and economics, the Sixth Circuit improperly rejected those interests. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (stating that the Court has "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects" when evaluating business incentives).

b. State laws that fairly encourage in-state business and domestic industry do not have a discriminatory effect on interstate commerce

The Commerce Clause permits states to enact laws that have the "effect of encouraging domestic industry." *Bacchus*, 468 U.S. at 271-72. Certainly, "[a] discriminatory effect does not result from fair encouragement of in-state business...." *Caterpillar*, 488 N.W.2d at 193 (citing *Armco, Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984); *Boston Stock Exchange*, 429 U.S. at 336-37)). Directly responsive to that authority, the Sixth Circuit recognized that Ohio's investment tax credit had the "same economic effect" as tax programs that this Court ruled "do[ ] not ordinarily run

---

estimated lost tax revenues of $131 million due to undeveloped brownfields. . . . Without programs designed to reinvigorate brownfields in inner cities, industry will continue to move to greenfields-pristine land surrounding suburbs and localities will continue to lose valuable property taxes critical to educate children and maintain infrastructure.")).

afoul" of the dormant Commerce Clause, such as subsidies. *Cuno v. Daimler Chrysler, Inc.*, 386 F.3d 738, 746 (6th Cir. 2004); *see also West Lynn Creamery*, 512 U.S. at 199, n.15 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)). Yet, contrary to that finding, the Sixth Circuit still concluded that Ohio's statute had a discriminatory effect. The reality is that the only discriminatory effect that could result is if the Sixth Circuit's ruling is permitted to stand. *See Hughes v Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Stevens, J., concurring) (the lower court's "novel interpretation of the 'burden' concept represented a departure which, had it been accepted, would impair rather than protect interstate commerce.").

Economic development, and therefore increased domestic industry, occurs "'when a local economy is vitalized, for example, by the creation of a job that is supported by external resources.'"[4] Basic economic theory recognized by the federal government, States, municipalities, and economic developers further establishes that direct job creation data must be multiplied many times to truly understand the far-reaching benefits of new business development.[5] When viewed in light of those economic

---

[4] Kathleen A. Norat & Eileen M. Lomoriello, "Clawbacks: A Help or A Hindrance in Negotiating Incentive Benefits?" J. MULTISTATE TAX'N & INCENTIVES, 2004 WL 335216 at *27 (Feb. 2004) (citing Economic Development Today: A Report to the Profession (American Economic Development Council, 1984)).

[5] *See* Regional Multipliers, U.S. Dept. of Commerce, March 1997 (3rd ed.); Elizabeth Weissman & Catherine G. Ware, "A Holistic Approach to Business Relocation and Expansions," J. MULTISTATE TAX'N & INCENTIVES, 1999 WL 1711518 at *31 (Aug. 1999) ("Most communities recognize that the creation of new jobs and the expenditure of significant capital result in the attraction of ancillary, new industries to a community, commonly referred to as the multiplier effect.") (citing Deming, Quality, Productivity, and Competitive Position (1982)).

realities, States' successes in encouraging intrastate commerce, growth, and development is easily illustrated by recent data on the direct and multiplier effects of state tax incentive programs from within the Urban Chambers' states.

From 1997 to the present, the Commonwealth of Kentucky has generated over $10.8 billion in capital investment as a result of its tax credits and wage assessment programs with the creation of over 54,000 direct jobs in the manufacturing sector and over 20,000 direct jobs in the non-governmental services sector. The manufacturing jobs generate an estimated annual payroll of $1.6 billion, and the service sector jobs generate an estimated annual payroll of $851 million. Applying recognized economic modeling,[6] these jobs result in an economic impact that includes over 138,000 indirect and induced jobs in the Commonwealth and additional indirect and induced annual earnings of $2.7 billion in the Commonwealth. The total economic impact on the state from these programs includes over 213,000 total jobs and $5.1 billion total earnings.[7]

From 1997 through 2002, the State of Tennessee generated over $17 billion in capital investment as a result of its tax credit programs with the creation of over 39,000 jobs in the manufacturing sector and 55,500 jobs in the non-governmental services sector. These jobs generate an estimated annual payroll of $4.17 billion. Applying the same methodology, these jobs result in an economic impact that includes over 109,000 indirect and induced jobs in the State

---

[6] The Minnesota IMPLAN Group, Inc.'s IMPLAN System was used and is similar to the U.S. Department of Commerce's methodology for estimated the economic impact of new investment. *See* Regional Multipliers, U.S. Dept. of Commerce, March 1997 (3rd ed.).

[7] These analyses are based on data obtained from the Kentucky Cabinet for Economic Development.

and additional indirect and induced annual earnings of $2.4 billion in the State. The total economic impact on the State from these programs includes over 204,000 total jobs and $6.6 billion total earnings.[8]

Therefore, the full beneficial measure of these programs cannot be overstated. They are invaluable to job and earnings creation, domestic industry, and other economic benefits to the Urban Chambers and their members.[9] Removal of this economic development tool will place an undue burden on States and local chambers of commerce as they promote economic development, domestic business, and interstate commerce. However, given the Sixth Circuit's treatment of this case, that information and evidence was not even considered.

c. The record below does not support a summary finding that Ohio's tax incentive had a discriminatory purpose or effect.

The District Court dismissed this matter on the pleadings under Federal Rule of Civil Procedure 12(b). The Sixth Circuit necessarily accepted the plaintiffs-respondents' appeal of the matter with that procedural posture. Nevertheless, based upon the plaintiffs-respondents' mere allegations regarding the purpose and effect of Ohio's tax credit, the Sixth Circuit summarily granted judgment to

---

[8] These analyses are based on data obtained from the State of Tennessee. Tennessee's data is based upon an aggregation of jobs into two categories-manufacturing and non-manufacturing.

[9] *See* Sherman, *supra* note 2, at 370-71 ("Success stories abound, from a new urban baseball stadium on the site of a former rail yard to a vibrant mixed-use complex in the heart of the central business district. In each of these ventures, the various incentives – regarding developers willing to take on these projects notwithstanding the greater risks involved – no doubt helped to move them from concept to reality.").

plaintiffs-respondents and enjoined Ohio from applying its tax incentive program.[10] Absent evidence by plaintiffs-respondents of a discriminatory purpose or effect, summary disposition in their favor was improper. *Trinova*, 498 U.S. at 385-86 ("Neither Trinova nor the secondary sources it relies upon present any evidence that the SBT was inspired as a way to export tax burdens or import tax revenues.").

Therefore, the appropriate resolution is to (a) recognize, as a matter of law, the legitimate purpose and effect of these state tax incentives or (b) require plaintiffs-respondents to submit evidence that meets their burden of proof on that issue, which petitioners, of course, would have an opportunity to rebut and would likewise be able to present their own evidence.

2. The Sixth Circuit Court of Appeals decided an important Commerce Clause question in a way that conflicts with the Michigan Supreme Court and significantly departs from this Court's long-standing precedent.

In what should have ended the analysis entirely, the Sixth Circuit acknowledged that the Ohio investment tax credit is "equally-available to in-state and out-of-state businesses." *Cuno*, 386 F.3d at 743. In *Complete Auto Transit, Inc. v. Brady*, this Court established the four-part test for analyzing state tax programs under the Commerce Clause. 430 U.S. 274, 279 (1977). In the lower court, plaintiffs-respondents challenged the Ohio statute on only one of those four elements. That is, the parties did "*not* dispute that the tax provisions at issue have sufficient nexus

---

[10] The Sixth Circuit has stayed enforcement of its ruling and injunction pending resolution of the parties' petitions for writs of *certiorari*.

with the state, are fairly apportioned, and are related to benefits provided by the state." *Cuno*, 386 F.3d at 742 (emphasis added). The plaintiffs-respondents' only contention was that Ohio's investment tax credit discriminates against interstate commerce. That limited constitutional challenge controls here and compels review and reversal.

As this Court pronounced, "[a]t least in the interstate commerce context . . . the antidiscrimination principle has not in practice required much in addition to the requirement of fair apportionment." *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 171 (1983). In this case, the plaintiffs-respondents provided no supporting evidence. Yet, contrary to *Container Corp.*'s guidance, the Sixth Circuit found discrimination where none existed.

In addition, the Sixth Circuit's opinion is directly opposite that of the Michigan Supreme Court in *Caterpillar*, addressing the constitutionality of a virtually identical state tax credit program. There, the court addressed a statutory deduction from Michigan's single business tax related to the acquisition of capital assets. Even though the deduction applied only to "capital acquisition related to Michigan business activity," the Michigan Supreme Court found no discrimination under the Commerce Clause. The Michigan court found that no discriminatory purpose was implicated because "the promotion and development and investment of business" in a state does not violate the Commerce Clause. *Caterpillar*, 488 N.W.2d at 192. In addition, the Michigan court found no discriminatory effect because the tax incentive was "available for any taxpayer." *Id.*

With essentially the same facts, the Sixth Circuit and the highest court of Michigan reached opposite conclusions. That alone is sufficient grounds for granting a writ of

certiorari to review and correct the conflicting rulings. Supreme Court Rule 10(a).

3. Ohio's tax credit does not interfere with free trade among the states.

While the economic incentive programs offered by Ohio's sister states are distinguishable from Ohio's investment tax credit, the Sixth Circuit's decision threatens to create significant uncertainty and adverse economic consequences for States, cities, and businesses throughout the Sixth Circuit and the country. Based upon the plaintiffs-respondents' admittedly novel theory, the Sixth Circuit fundamentally altered Commerce Clause jurisprudence, threatening the viability of economic development programs throughout the country, preventing the Urban Chambers from fairly competing in the global economy, and placing an undue burden on interstate commerce.

In general, "constitutionality under the Commerce Clause ... depends upon the practical effect" of the tax. *Department of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750 (1978); *Complete Auto Transit*, 430 U.S. at 279. For state tax programs in particular, this Court has stated that they must have internal consistency, *i.e.*, "a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *American Trucking Ass'n, Inc. v. Scheiner*, 482 U.S. 266, 284 (1987) (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)). Virtually every state employs tax incentives for promoting economic development. And regardless of any arguments as to the efficacy of those incentive programs, there is absolutely no evidence that they are interfering with free trade or harming any citizen or

taxpayer.[11] The interference with free trade comes only by means of the Sixth Circuit's opinion prohibiting Ohio from employing the competitive tools used for decades and available to the remaining States.

As illustrated by the job creation and economic impact data provided in Section I.b. above, neither the Ohio investment tax credit nor the tax incentives of its nearby sister states have interfered with free trade. Rather, far from impeding interstate commerce, the added investments and accompanying multiplier effect have generated significant commerce, including a substantial number of jobs. The end result, prior to the Sixth Circuit's decision, was that all States were benefiting from increased business operations in their home territory attained via interstate competition. This is no longer possible if the Sixth Circuit's decision is not reviewed and, ultimately, reversed.

CONCLUSION

The Ohio investment tax credit has neither an impermissible purpose nor an impermissible effect. The Court should grant the Ohio Petitioners' and DaimlerChrysler's petitions for writ of *certiorari* and reverse the Sixth Circuit's ruling on the constitutionality of Revised Code § 5733.33.

---

[11] Professor Enrich stated that citizens/taxpayers, such as the Respondents, "can point to no direct reduction of [their] tax liability or any assured expansion of services that the elimination of the challenged tax break would yield." Peter D. Enrich, "Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business," 110 HARV. L. REV. 377, 414 (Dec. 1996).

July 20, 2005

Respectfully submitted,

Jeffrey R. Teeters (counsel of record)
Matthew C. Blickensderfer
Robert D. Shank
Clint C. Watson
FROST BROWN TODD LLC
201 E. 5th St., 2200 PNC Ctr.
Cincinnati, Ohio 45202
(513) 651-6800

C. Edward Glasscock
William L. Skees, Jr.
FROST BROWN TODD LLC
400 W. Market St., 32nd Floor
Louisville, Kentucky 40202

William C. Gullett
FROST BROWN TODD LLC
424 Church St., Suite 1600
Nashville, Tennessee 37219

Jack R. Cunningham
FROST BROWN TODD LLC
Lexington Financial Center
250 W. Main St., Suite 2700
Lexington, Kentucky 40507